RESERVED

IN THE HIGH COURT OF UTTARANCHAL, NAINITAL

Criminal Appeal No. 289 of 2003

Pritam S/o Baru, R/o Dharampur,
P.S. Manglore, District – Hardwar …… Appellant

Versus

State of Uttaranchal …….. Respondent.

Coram: Hon'ble P.C. Verma, A.C.J.
Hon'ble Irshad Hussain, J.

Date: 27.02.2004

[Per Hon'ble P.C. Verma, A.C.J.]

This Criminal appeal has been filed by the appellant against the judgment and order dated 05.08.2003 passed by the Additional Sessions Judge/ F.T.C. Hardwar in Sessions Trial No. 26 of 1996 convicting and sentencing him to undergo life imprisonment and a fine of Rs. 20,000/- under section 302/34 I.P.C. and three years R.I. and fine of Rs. 5000/- under section 201 I.P.C.

The prosecution case as disclosed from the first information report and the evidence, is that the brother of the complainant Bijendra s/o Medu was missing since the night of 8/9.12.2001. A report in that regard was lodged by the complainant in Police Out Post, Gorthanpur, P.S. Manglore, District-Hardwar, to the effect that complainant was informed by his Bhabhi (sister-in-law) Smt. Usha Devi that in the night of 8/9.12.2001, her Bhabhi's son Vikas, her Jija (brother-in-law) Pritam Singh s/o Baru r/o Dharampur, friends of Vikas, namely, Neetu and Bheria r/o Bijopura, took away his brother forcibly with intent to usurp Rs. 12,000/- which he had received by sale of sugar-cane, his land and house; and they have threatened his *Bhabhi* that in case she tells this to anyone, they will kill her. This incident was witnessed by his villagers, namely, Jay Kumar s/o Chandrapal Gujar and Sri Nepal s/o Kali Ram, who saw all the above four accused persons forcibly pulling his brother

in the night of 8/9.12.2001 near the field of Buddhu Jhivar. The complainant came this fact and lodged the report on 14.12.2001 (Ext. Ka-1)

On receipt of the report, investigation of the case was handed over to Sri N.C. Johari, Sub Inspector, who arrested the accused Pritam Singh on 15.12.2001 and on his pointing the dead body of Vijendra Singh was recovered. The Investigating Officer prepared site plan (Ext.Ka-8) of the place from where the dead body was recovered. The Investigating Officer also conducted inquest on the dead body of deceased and prepared *Panchayatnama* (Ext. Ka-13) Post mortem on the dead body of the deceased was conducted by Dr. S.C. Sharma, Medical Officer, H.M.G. Hospital, Hardwar.

After the arrest of accused Vikas Singh, the Investigating Officer took him in police remand and on his pointing , a knife was recovered on 24.12.2001 from the field of Kirta s/o Buddu Jhivar r/o Khanpur. The accused confessed that he throttled the deceased and with the recovered knife, he cut his neck. Thereafter, he cleaned the knife with mud and screened the knife in the sugar-cane field.

On 25.12.2001, the Investigating Officer also obtained police remand of accused Neetu alias Virendra, who told that the knife with which deceased Vijendra Singh’s neck was cut, was screened by him in the sugar cane field . Accused Neetu alias Virendra searched and took out knife from the field of Kirta S/o Buddhu. Accordingly, a case crime No. 84/381/2001 under Section 25/4 Arms Act was registered against Neetu alias Virendra.

After completion of investigation, the Investigating Officer submitted charge-sheet against the appellant and other co-accused.

The appellant was committed to the Court of Sessions on 10.04.2002 by the Chief Judicial Magistrate, Roorkee, District-Hardwar and the charge against the accused-appellant Pritam and co-accused Vikas, Neetu alias Virendra amd Rajendra alias Bheria under Sections 364, 302/34 and 201 I.P.C. was framed by the Sessions Judge, Hardwar on 09.05.2002. Charge under Section 25/4 Arms Act was also framed against co-accused Vikas Singh and Neetu alias Virendra. All of them pleaded not guilty and claimed to be tried.

Prosecution examined eight witnesses in the trial Court in support of its case, namely, Pravin (P.W.1), Jai Kumar (P.W.2), , Nepal (P.W.3), Smt. Usha (P.W.4), S.I. Naresh Chandra Johari (P.W.5), S.I. Chandan Singh Chauhan (P.W.6), Constable Ram Niranjan Singh (P.W.7) and Ishwar Singh (P.W.8).

Prosecution witnesses proved the First Information Report (Ext.Ka-1), Recovery memo of the dead body (Ext. Ka-4) Recovery memo of plain and blood stained earth (Ext.Ka-5), Recovery memo of spade (Ext. Ka-6), site-plan Ext. Ka-7 to Ext.Ka-11), charge-sheet under Sections 364, 302 & 201 I.P.C. (Ext. Ka-18) recovery memo of knife (Ext. Ka-19), charge-sheet under section 25/4 Arms Act State versus Vikas Ea.22) and charge-sheet under section 25/4Arms Act State versus Neetu alias Virendra Nakari (Ext.Ka-23), site plan in case crime No. 82/380/2001 under Section 245/4 Arms Act State versus Vikas (Ext. Ka. 24) and site plan (Ext. Ka-25) in case crime No. 84/381/2001 State versus Neetu alias Virendra.

Learned counsel for the defence admitted genuineness of F.I.R. in case crime No. 80/366/2001 (Ex.Ka.2), post mortem report (Ext.Ka.12), Panchayatnama (Ex.Ka.13), and letter sent to Chief Medical Officer (Ex.Ka.14), sample seal (Ext. Ka. 17, Chick F.I.R. under crime No. 83/380/2001 under Section 25 Arms Act (Ext. Ka. 20), copy of report no. 20 (Ext. Ka.21) and F.I.R. in case crime no. 84/381/2001 State Vs. Neetu U/s 25/4 Arms Act (Ext.Ka. 26)

The defence of the appellant was of denial and of false implication. He did not adduce any evidence in defence.

Learned Sessions Judge on the basis of his appreciation of the material on record accepted the prosecution version and found the appellant guilty of committing the murder of Vijendra and accordingly convicted and sentenced his as mentioned above.

Heard Sri Arvind Vashisth, learned counsel for the appellant and Sri S.P.S. Panwar, learned Government Advocate appearing on behalf of the State. The record of the case has also been examined by us.

We may now proceed to examine the evidence of the prosecution witnesses.

P.W.1 Pravin is the complainant of the case. His evidence is to the effect that his brother Vijendra had left house and his Bhabhi (sister-in-law) had informed him about this fact. He stated that he got his report scribed by one Jagpal Singh and after affixing his thumb impression on it, had handed it over at the police station. He specifically stated that his Bhabhi did not tell him as to who had abducted his brother Vijendra. In his next breath he stated that he had named the appellant and the other co-accused in the F.I.R. since his Bhabhi disclosed their names on the day when he lodged his report. He also stated that his *Bhabhi* had not disclosed the fact of threats having been extended by the accused and the other co-accused that if she would dare to let anyone know about this fact, she would be killed. He further stated that he knew Jai Kumar (P.W.2) and Nepal (P.W.3) and they too had informed that his brother had been taken away by the appellant and the co-accused.

In his cross-examination, this witness stated that he had gone all alone to the police station and whatever he dictated, the Diwan reduced into writing. He specifically stated that on the saying of people, he had written in his report that the appellant and other co-accused intended to usurp Rs. 12,000/ and the house and landed property of the deceased. He categorically stated that he had neither seen nor had heard about abduction and murder of his brother Vijendra. He admitted that the appellant and the co-accused could have been named on account of strained relations. He, however, stated that the matter was reconciled between him and the accused.

P.W.2 is Jai Kumar. The deceased as well as the appellant and other co-accused knew him. He stated that about a year back, Vijendra had absconded. He could not tell as to who in fact had abducted him but specifically stated that he had not seen as to who in fact had abducted him but specifically stated that he had not seen the appellant or the co-accused abducting Vijendra. He was declared hostile by the prosecution and in his cross-examination he specifically stated that the Daroga had not recorded his evidence. When he was read over his evidence under Sec 161 Cr.P.C. he denied having given such a statement.

P.W.3 Nepal stated that he had heard that Vijendra had gone somewhere, but denied having disclosed this fact to complainant-Pravin. This witness was also declared hostile and cross-examined by

the Public Prosecutor. In his cross-examination, he denied having given any statement to the investigating officer and when confronted with his statement recorded under sec. 161 Cr.P.C. he totally disowned it.

P.W.4 Smt. Usha is the widow of Vijendra. She stated that her husband had gone to the mill (sugarcane mill) to sell sugarcane, but was not certain as to whether he received Rs. 12,000/- as sale consideration of the sugarcane. She knew the appellant and the other co-accused since before. She was specific in stating that the appellant and the other co-accused did not abduct her husband. This witness was also declared hostile by the prosecution and cross examined at length. She disowned her statement recorded by the investigating officer under sec. 161 Cr. P.C. She did state that the matter was sorted out between her and the accused.

At this juncture, we feel it appropriate to mention that complainant-P.W.1 Pravin has totally disowned his written report which he lodged at the police station and on the basis of which the investigation ensued. It is equally important to mention it here that the witnesses of last seen have turned hostile and have gone to the extent of disowning their statement recorded by the investigation under section 161 Cr.P.C. during the course of investigation. As we have seen above, there is no witness of actual murder. This leads us to a legitimate inference that it was blind murder and the prosecution has sought to rope in the appellant on the basis of circumstantial evidence.

The rest of the prosecution witnesses, i.e. 5 Naresh Chandra Johari, P.W. 6-S.I. Chandan Singh Chauhan, P.W.7- Constable Ram Niranjan Singh and P.W. 8- Ishwar are police personnel and have proved the recovery of the dead body as also the weapons used for committing the murder of Vijendra and the spade.

P.W.5 Naresh Chandra Johari stated about the recovery of the dead body of Vijendra on 15th December 2001 on the basis of extra judicial confession and on the pointing out of appellant Pritam from the field of Kirta son of Buddu Jhiver. He reduced into writing Fard recovery of body of deceased Vijendra, which states that appellant Pritam, while in police custody, confessed that he along with his son Vikas, Neetu alias Virendra and Rajendra had abducted and murdered

Vijendra to satisfy their lust for money and landed property. It further shows that appellant had confessed that they had murdered Vijendra between the night of 8/9.12.2001 by throttling him and cutting his neck with knives and that he has hidden the body in the Jungle of Khanpur. The Fard recovery of the dead body further goes to mention that appellant had stated that he alone and none else knew the place where he had hidden the dead body and would get it recovered. On this confession of the appellant, the investigating officer (P.W.5) along with other police personnel, complainant Pravin and witness Shyam Pal (not examined as witness during the trial) accompanied the appellant who got discovered the dead body from the field of Kirta. This witness also arrested co-accused Vikas Singh and Neetu alias Virendra and on their confession recovered the knives which co-accused Vikas Singh and Neetu alias Virendra alleged to have used for slitting the throat of the deceased. Since we are dealing only with the appeal of Pritam, we need not go into great details on this count, but suffice to mention it here that in all the instances of recovery of the dead body, the incriminating weapon and the spade, which were made from different places and on different dates, the sole public witness of recovery is one and the same, i.e. Shyam Lal. As mentioned above, though he was an important witness to complete the chain of events, but for reasons best known to the prosecution, he has not been examined during the trial. In his cross-examination this witness has stated that people had assembled during the course of recovery, but he did not record their statement. He further stated that he recovered the knives lying on the ground and did not find any knife buried under the ground.

P.W. 6 S.I. Chandan Singh Chauhan had investigated case crime nos 83/380/01 under section 25/4 Arms Act against Vikas Singh and Neetu alias Virendra. Since we are not sitting in appeal against conviction and sentence of Vikas Singh and Neetu alias Virendra, we need not go into details of the evidence of this witness.

P.W. 7 Constable Ram Niranjan Singh is police witness of recovery of dead body of Vijendra and recovery of weapons of assault and the spade. Regarding recovery of dead body of Vijendra, he has given similar and parrot-like evidence as that of P.W. 5 S.I. Naresh

Chandra Johari, the investigating officer. However, this witness has categorically stated that the dead body was not in a decomposed condition and the neck was slit open from the front.

P.W. 8 Constable Ishwar Singh is also a police witness of recovery of the knife on the confession and pointing out of co-accused Vikas Singh. His evidence so far as we are concerned for adjudication of the present appeal, is of no consequential importance, hence we need not go into its details. However, we feel it pertinent to mention it here that this witness has stated that he used the same knife for slitting the throat of deceased Vijendra.

Before proceeding further more, we would like to point it here that the autopsy surgeon has not been examined in this case. However, we have carefully gone through the post mortem report prepared by Dr. S.C. Sharma. Dr. Sharma found one incised wound 8 cm. X 6 cm. On point of neck; 5 cm. Below chin with clotted blood. He found the body thin built with eyes closed and mouth open. Rigor mortise had passed of. The skin was peeling at places and hair and nails were loose. Decomposition was present. The cause of death according to the doctor was asphyxia due to aviary obstruction (choking).

Having considered the prosecution evidence on record, we may proceed to analyse the prosecution case, which rests on circumstantial evidence.

As noticed earlier, complainant Pravin (P.W.1) lodged the F.I.R. on 14.12.2001 indicating therein that the appellant along with the co accused had forcibly abducted the deceased at about midnight in the night intervening 8/9.12.2001. However, this witness during trial on one hand has stated that he submitted his written report at the police station, but at the same time he disowned his written report and stated that he went to the police station all alone and whatever was stated by him at the police station, the same was reduced into writing by the Diwan posted there. The evidence of this witness is nothing but a tissue of lies inasmuch as he stated that his *BhabhiSmt.* Usha has told him about abduction of Vijendra by the appellant and co accused, but in the very next breath in his cross examination, this witness took a somersault and

stated that he did not know the appellant and the co-accused and he named them in the F.I.R. on the saying of the villagers. It is pertinent to mention it here that though the written report Ext. Ka-1 on record is dated 14.12.2001 in which the date of incident is mentioned as 8/9.12.2001; this witness has specifically stated that he had lodged the report on the next day of the incident. It is well settled that in cases of murder, which entails the maximum penalty, the courts should make a cautious approach towards the prosecution evidence. In the present case, as observed above, the evidence of the complainant does not inspire confidence so as to record a positive finding that the appellant along with co accused had abducted the deceased with the intention of committing his murder for pecuniary gain. The rest of the witnesses have turned hostile and the prosecution has not been able to extract any incriminating circumstances, which would go to connect the appellant with the murder.

The learned trial court has based conviction of the appellant on the sole ground that in his cross-examination, this witness stated that he had sorted out his disputes with the appellant and co accused, meaning thereby he has given contradictory evidence to save them from conviction. So far as the other witnesses produced by the prosecution, i.e. P.W. 2 Jai Kumar, PW.3 Nepal and P.W. 4 Smt. Usha, who are witnesses of fact, are concerned; they have not supported the prosecution case and have been declared hostile.

We are afraid that in the facts and circumstances of the present case, the learned trial court has committed a grave error while recording the above finding. It has to be kept in mind that the cardinal principles in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless the presumption is rebutted by the prosecution by production of evidence which may prove him to be guilty beyond reasonable doubt.

In the instant case, except for the evidence of the police, the prosecution to prove the recovery of dead body has adduced no public witness. We feel it pertinent to mention it here that Shyam Lal has been mentioned to be a public witness in all the four instances of recovery which were made on different dates from different places. This witness

too, for reasons best known to the prosecution, has been withheld from appearing in the witness box.

The learned trial court while recording conviction against the appellant under Section 302 and 201 I.P.C. has accepted the testimony of the police personnel on the point of recovery. We are not oblivious of the fact that from Section 24 of the Evidence Act it is manifest that confession made to police officer is not to be proved. But at the time it is always open for the Courts to decide whether such a confession was made voluntarily and was truthful. The court shall also satisfy itself whether or not the accused was a free man when he made the confession.

In the instant case, the deceased was alleged to have been abducted by the appellant and his accomplices on 8/9.12.2001. The written report, Ext. Ka.-1 was lodged by the complainant at the police station on 14.12.2001 in which he had named the appellant as one of the accused. The investigating officer arrested the accused on 15.12.2001 and it is alleged that he confessed having murdered the deceased with the active assistance of co accused, i.e. Vikas and Neetu alias Virendra by throttling and slitting open his throat with the aid of knives. On the basis of confession made by the appellant to the police and on his pointing out, the police recovered the dead body of deceased from the field of Kirta. It is the further case for the prosecution that on the pointing out of Vikas Singh and Neetu alias Virendra, the police recovered two knives from different places on different dates. In order to ascertain whether or not the appellant had confessed due to existence of threat, inducement or promise, the assertions made in the Fard recovery gain importance. It is pertinent to mention it here that Ext. Ka. 4 shows that the appellant had confessed to the police that he and his accomplices had committed murder of Vijendra, but astonishingly it further goes to show that it was the appellant alone who knew the place where the body of deceased was hidden. In our judgment, if the confession of appellant before the police authorities that he with the active assistance of the co accused had murdered and buried Vijendra, has to be accepted, then the subsequent narration that he alone knew the place where the dead body was buried and would get it recovered, is nothing but fanciful conjecture

on the part of the investigating agency. This narration in the recovery memo, which despite of the fact that the prosecution had miserably failed to complete the chain of circumstantial evidence formed the basis of conviction of the appellant by the trial court, itself is a strong ground to hold that the prosecution is not giving the true and unvarnished facts. We are constrained to observe that evidence of the prosecution witnesses in view of the above facts do not inspire confidence that the machinery of law was set at motion on 14.12.2001 upon the lodging of the written report by the complainant. Rather the facts and circumstances of the case go a long way to show that it was activated on the recovery of dead body of Vijendra, who as per complainant's testimony, was missing since 8/9.12.2001 and since it was a blind murder the entire prosecution case has been fabricated against the appellant and the co accused on fanciful conjecture. The above observations find support from the fact that while the prosecution has tried to prove the guilt of co-accused Vikas Singh and Neetu alias Virendra by setting up a case against them that they slit open the neck of deceased Vijendra with their knives, and as alleged by the prosecution, the incriminating weapons were recovered at the instance of said persons, the autopsy surgeon has found only one injury on the neck of the deceased. It is also apposite to mention it here that no blood was found on the knives alleged to have been used in the murder of Vijendra and thus, the prosecution has webbed a flimsy ground that the said persons had erased the blood from the blade of the knives with the help of earth before throwing them in the fields.

Thus, the evidence of confession and recovery of the dead body at the instance of the appellant stands distinctly disproved.

Normally there is a motive behind every criminal act and that is why the investigation agency as well as the court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. Absence of motive may not be relevant where the evidence is overwhelming, but in a case which is based on circumstantial evidence, motive for committing the crime assumes greater importance. Thus, in cases of circumstantial evidence, it should always be the endeavour of the Court to ascertain

what was the immediate impelling motive on the part of the accused which led him to commit the crime.

We have very carefully gone through the prosecution evidence on this point and are constrained to note that the immediate impelling motive supplied by the prosecution for committing the crime is not proved. As mentioned above, complainant Pravin in his report has mentioned that the crime was committed with a view to usurp Rs. 12000/- and the house and landed property of the deceased. But during trial, in his evidence this witness has categorically stated that he had mentioned the fact regarding abduction of deceased by the appellant and co accused with a view to usurp Rs. 12,000/- and his house and landed property only on hearsay and saying of people. P.W. 3 Smt. Usha, who is wife of the deceased, also did not state about the motive for committing the crime. At the cost of repetition, it may be mentioned that the evidence on record leads us to one and the only fact that in the case in hand, the prosecution has miserably failed to establish motive for the commission of the crime.

It is well settled that in cases of circumstantial evidence, conviction can only be sustained if the prosecution evidence is tested on the anvil of three conditions, namely, (i) – the circumstances indicating guilt must be cogently and firmly established; (ii) – such circumstances must be of a definite tendency unerringly pointing towards the accused's guilt; and (iii) taken cumulatively, the circumstances should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. Our above observation is in consonance with a plethora of cases, in which the Hon'ble Apex Court has time and again approved these golden principles in cases of circumstantial evidence and we need not burden our judgment in mentioning them.

Our observations made above lead us to a definite and legitimate inference that the prosecution has utterly failed to prove its case against the appellant beyond reasonable doubt; rather the hypothesis put forward by the prosecution to bring home the guilt of the appellant is based merely on conjectures and suspicion. There are yawning gaps in the chain of circumstances which, in our opinion, are inconsistent with the guilt of the appellant and in our judgment, the prosecution evidence when weighed on the anvil of principles mentioned above, does not prove the guilt of the appellant cogently and firmly; the circumstances do not unerringly point towards the appellant's guilt; and our judicial

conscience is not satisfied that the circumstances of the case are so established that there is no escape from the conclusion that within all human probability the crime was committed by the appellant and none else. We have already observed above that the evidence regarding confession and recovery of dead body on the pointing out of the appellant does not inspire confidence and has to be rejected.

In the result, the appeal is allowed. Conviction of the appellant under sections 302 & 201 I.P.C. and sentence of life imprisonment and a fine of Rs. 20,000/- and three years rigorous imprisonment and fine of Rs. 5000/- under the respective counts are hereby set-aside. The appellant is in jail. He shall be released forthwith unless wanted in any other case. His bail bonds are cancelled and sureties discharged.

(Irshad Hussain, J.) **(P.C. Verma, A.C.J.)**